Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Section 272(b)(1)'s "Operate Independently"	)	
Requirement for Section 272 Affiliates	)	**WC Docket No. 03-228**
	)	

REPLY COMMENTS OF BELLSOUTH

BELLSOUTH CORPORATION

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TABLE OF CONTENTS

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	)	
Section 272(b)(1)'s "Operate Independently"	)	
Requirement for Section 272 Affiliates	)	**WC Docket No. 03-228**
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BellSouth Corporation, for itself and its wholly owned affiliated companies (collectively "BellSouth"), submits the following reply comments in response to comments filed in the above referenced proceeding.[1]

I. Introduction and Summary

The Commission should reverse its restrictions regarding joint ownership of switching and transmission facilities, including the land and buildings housing such facilities, and the provision of operation, installation, and maintenance ("OI&M") functions between the Bell operating companies ("BOCs")[2] and their affiliates that provide interLATA services ("272 affiliate"). The record in this proceeding fully demonstrates that such restrictions are unnecessary and burdensome. They represent a classic belt-and-suspenders approach to regulation. As BellSouth and other BOCs pointed out, other regulations protect against any concerns that the Commission may have for lifting these restrictions. Leaving these restrictions

[1] *Section 272(b)(1)'s "Operate Independently" Requirement for Section 272 Affiliates*, WC Docket No. 03-228, *Notice of Proposed Rulemaking*, FCC 03-272 (rel. Nov. 4, 2003).

[2] Section 272 of the Telecommunications Act of 1996 ("Act"), which includes the operate independently standard (§ 272(b)(1)), only applies to BOCs that have received authority to provide interLATA services within their operating region. BOCs are sometimes referred to as incumbent local exchange carriers ("ILECs").

in place does nothing more than require the BOCs to place redundant facilities and maintain redundant employees to address concerns that are protected by redundant safeguards.

At their core, oppositions to the elimination of the restrictions can be reduced to the speculation that there is the potential for the BOCs to engage in cost misallocation and discrimination. Neither of these suppositions, however, provides a valid justification for continuing the Commission-created restrictions that currently exist. As BellSouth discussed in its comments, there exist regulations, other than the restrictions on joint ownership and OI&M, that ensure that costs are not misallocated from a competitive service to a regulated service, just as there are regulations that prevent discrimination between the BOC and its 272 affiliate. These regulations are more than adequate.

For example, while some commenters tried to deny the effectiveness of price regulation, the facts cannot be ignored. The Commission implemented price regulation as a means to incent carriers to achieve gains through operational efficiencies. By moving rate regulation away from a cost-plus system to a price cap system, the Commission removed all motivation a carrier may have had to misallocate costs. Under price cap regulation, an increase in costs does not translate into increased prices. Indeed, the prices that a BOC charges for its services are capped. For this reason, the Commission can allow BOCs to provide OI&M services to their 272 affiliates with no fear that costs will be improperly allocated from the 272 affiliate to regulated operations. Moreover, even if the BOC did misallocate costs – which it will not – prices for consumer and access services would be protected by the caps placed on these services by price regulation.

Significant regulation also exists to protect against potential discrimination. First, § 272(c) requires that any service, including OI&M services, if allowed, a BOC provides to its 272 affiliate must be provided to any entity on a nondiscriminatory basis. Thus, any carrier will be able to obtain the same services, on the same terms and conditions, that the 272 affiliate receives. BOCs have always been allowed to provide administrative services, as well as virtual collocation services, and this safeguard has acted as an adequate protection against discrimination in the provision of these services. Second, prior to sunset of the separate affiliate obligations under § 272, BOCs and their 272 affiliates will be subject to an audit of the rules, including § 272(c). Thus, the Commission will be able to monitor BOCs' compliance with the nondiscrimination obligations.

The Commission should also eliminate the restrictions against joint ownership of switching and transmission facilities, including the land and buildings where they are housed. As the Commission has found in the past with enhanced services, a BOC's can provide integrated regulated and competitive services on a nondiscriminatory basis. Clearly, then, a BOC can joint own facilities with a 272 affiliate without discriminating in favor of the 272 affiliate. Prohibition against joint ownership only impedes efficient operations of the networks.

II. The Commission Should Allow BOCs to Provide OI&M Functions for Their 272 Affiliates, and Vice Versa

There is no valid reason to continue to restrict performance of OI&M functions between a BOC and its 272 affiliate. These functions present nothing unique or different from administrative services that a BOC may currently provide for its 272 affiliate. Just as a 272 affiliate can today acquire administrative services, on a nondiscriminatory basis, from its affiliated BOC and maintain operational independence, it can also maintain operational independence while acquiring OI&M functions on a nondiscriminatory basis. Thus, maintaining rules for the provision of OI&M functions that are different from rules governing the provision of administrative functions is merely a distinction without a difference. The Commission has safeguards in place that protect against the fears of cost misallocation and discrimination that are raised by commenters.

A. Price Cap Regulation Eliminates the Incentive to Misallocate Costs

Each of the commenters that oppose the removal of the OI&M restrictions argue that BOCs have an incentive to allocate a disproportionate share of costs from interLATA services provided by the 272 affiliate to the regulated services provided by the BOC.[3] The commenters theorize that the BOCs will somehow accumulate costs that should be assigned to the 272 affiliate within the BOC. The problem with this theory is that the incentive for this brand of cost misallocation no longer exists because of price cap regulation and exchange and exchange access competition. Pricing of interstate services for most ILECs has moved to price cap regulation.

Regardless of the statements made by AT&T, price regulation as it exists for BellSouth, and most ILECs, eliminates the concerns of cost misallocation. Indeed, even the Commission, as well as federal courts, have recognized that "because price cap regulation severs the direct link between regulated costs and prices, a carrier is not able automatically to recoup misallocated nonregulated costs by raising basic service rates, thus reducing the incentive for the BOCs to allocate nonregulated costs to regulated services."[4] Significantly, the Commission's statement regarding price cap regulation came before the elimination of sharing and the lower formulas

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3 Comments of AT&T Corp. at 22-27 ("AT&T Comments"); MCI Comments at 4; Comments of Sprint Corporation at 2-3 ("Sprint Comments"); Comments of Americatel Corporation at 8-9 ("Americatel Comments).

4 *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards*, CC Docket No. 90-623, *Report and Order*, 6 FCC Rcd 7571, 7596, ¶ 55 (1991), *California v. FCC,* 39 F.3d 919 (9th Cir. 1994), *cert denied*, 514 U.S. 1050 (1995); *see also California v. FCC*, 39 F.3d at 926-27; *United States v. Western Elec. Co.*, 993 F.2d 1572, 1580 (D.C. Circuit), *cert denied*, 510 U.S. 984 (1993) ("[price cap regulation] reduces any BOC's ability to shift costs from unregulated to regulated activities, because the increase in costs for the regulated activity does not automatically cause an increase in the legal rate ceiling.").

cost adjustment ("LFAM")[5] – the only elements of price cap regulation that could potentially create a direct link from costs incurred to the rate increases. With these eliminations, there is now truly no link between an increase in costs and an increase in prices.

AT&T is well aware of the impact of price cap regulation on the occurrence of costs and the setting of prices. Although it now attempts to dismiss the obvious and have the Commission retain OI&M restrictions on the basis that "price cap regulation has not eliminated the incumbents' incentives to misallocate costs,"[6] AT&T certainly believes in the effectiveness of price cap regulation for such functions when it suits its purpose. When seeking to have the Commission's accounting rules revised as applying to AT&T's services subject to price cap regulation, AT&T fully acknowledged that "with respect to AT&T's services still subject to price caps, the specifics of AT&T's price cap plan eliminate any ability or incentive to shift costs."[7] AT&T went on to conclude "[i]n short, the basic assumption of the cost-shifting/cross-subsidization theory (i.e., that a regulated carrier can recover inflated transfer prices or other shifted costs through higher regulated price levels) is entirely inapplicable to AT&T . . . for services subject to AT&T's price cap regulatory system."[8] What was true for AT&T is equally true for price cap LECs.

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[5] LFAM was eliminated for any price cap ILEC that chose to take advantage of pricing flexibility for access services. All of the major ILECs have taken advantage of pricing flexibility and thus have lost any right to LFAM.

[6] AT&T Comments at 24. AT&T dusts off the same argument – alleging that ILECs have an incentive to misallocate costs under price cap regulation – that it has made in various proceedings regarding rules affecting BOC's § 272 affiliates used for the provision of interLATA telecommunications services. AT&T's strained position, however, is simply incorrect.

[7] Comments of American Telephone and Telegraph Company, CC Docket No. 93-251, at 11 (filed Dec. 10, 1993).

[8] *Id.* at 13.

In its attempt to now disavow its past acceptance of price cap regulation to eliminate a carrier's incentive to misallocate a disproportionate share of costs to its nonregulated services, AT&T also argues that the Commission continues to apply the cost allocation requirements even though price cap regulation had been implemented for ILECs. AT&T cites the Commission's *Accounting Safeguards Order*[9] and even the passage of the 1996 Act as evidence that the Commission and Congress continued to require cost allocation requirements after price cap regulation had been in existence.[10] In making its findings in the *Accounting Safeguards Order*, however, the Commission reviewed the necessity of continuing the cost allocation requirements of Part 64 in light of price cap regulation but found that because of sharing, LFAM, and the fact that some intrastate services remained under rate of return regulations that carriers may still have an incentive to "assign a disproportionate share of costs to regulated accounts." The Commission stated, however, "[w]e recognize that changes in the competitive conditions of local telecommunications markets in the future may cause us to re-examine the continued need for our Part 64 cost allocation rules."[11] Since that time, the marketplace and the regulatory paradigms have shifted. Competition has increased and the Commission has eliminated, for large ILECs, the sharing and LFAM elements from price cap regulation, the only remaining elements that could have created potential incentives for price cap ILECs to shift costs.[12] Moreover, as

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[9] *Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996*, CC Docket No. 96-150, *Report and Order,* 11 FCC Rcd 17539 (1996) ("*Accounting Safeguards Order*").

[10] AT&T Comments at 23-24.

[11] *Accounting Safeguards Order,* 11 FCC Rcd at 17661, ¶ 271.

[12] *See Price Cap Performance Review for Local Exchange Carriers; Access Charge Reform*, CC Docket Nos. 94-1 and 96-262, *Fourth Report and Order in CC Docket No. 94-1 and Second Report and Order in CC Docket No. 96-262*, 12 FCC Rcd 16642, 16700, ¶148 (1997) ("*1997 Price Cap Review Order*"), *aff'd in part, rev'd in part, United States Telecom Ass'n v. FCC*, 188 F.3d 521 (D.C. Cir. 1999). *See also Access Charge Reform; Price Cap Performance Review for*

BellSouth pointed out in its comments, the Commission has adopted the CALLS plan regarding access charges.[13] Additionally, while Congress did require a separate affiliate for the provision of certain services, it also included a sunset of this requirement. Thus, even Congress recognized that as the market changed and competition increased, the need for separation, including the "operate independently" standard of § 272(b)(1), would no longer be needed.

AT&T's contention that price cap regulation is not used in some states is also unpersuasive. Most states, all states in BellSouth's territory, are now under price caps for intrastate services. Thus, it is clear that cost allocation is not necessary to ensure just and reasonable rates or to guard against cross-subsidization. Moreover, just because some LECs may remain under rate of return regulation for interstate services and some states may continue rate of return for intrastate services is no reason to require the prohibition of joint provision of OI&M services.

AT&T's basic premise for attempting to discredit the significance that price cap regulation has on cost allocation is that cost misallocation can continue to have a direct impact on the prices that a carrier may charge for regulated services – *i.e.*, it argues that BOCs will incur costs in the regulated operations causing ratepayers to invariably overpay for regulated services. This flawed argument fails for two reasons. First, the very purpose of price cap regulation was to incent carriers to increase returns by creating efficiencies in their operations or by developing

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Local Exchange Carriers; Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers; and Petition of U S West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA, CC Docket Nos. 96-262, 94-1, 98-157 and CCB/CPD File No. 98-63, *Fifth Report and Order and Further Notice of Proposed Rulemaking*, 14 FCC Rcd 14221, 14304, ¶ 162 (1999) ("*Pricing Flexibility Order*").

[13] AT&T's attempt to diminish the CALLS plan on the basis that it is due to expire soon is relevant only if AT&T is supporting the notion that access charges return to a pre-CALLS scenario, an unlikely event.

new services that customers want. Ratepayers are protected in this environment by maximum caps on prices that carriers may not exceed. Additionally, as discussed previously, AT&T certainly embraced the philosophy of price cap regulation when seeking it for itself, and cannot legitimately argue that the philosophy is now flawed when applied to others.

Second, price caps also protect ratepayers because ILECs subject to price cap regulation cannot raise prices for price cap services if the ILECs become more inefficient. The fact of the matter is that AT&T raises the specter of consumers paying unreasonable prices but price cap regulation was designed specifically to regulate prices and insure that they remain just and reasonable. Cost allocation is a mechanical process unrelated to price setting or price regulation.

AT&T also alleges that BOCs can manipulate interLATA prices by using the OI&M as a vehicle to keep costs within the BOC and thus giving the 272 affiliate an artificially low cost structure. AT&T alleges that this will allow the 272 affiliate to under price its services, putting a price squeeze on its competitors. This position is clearly wrong. With its reply comments filed in connection with its petition for forbearance from OI&M restrictions, Verizon filed the Declaration of Timothy J. Tardiff, an economist with the National Economic Research Associates, Inc ("NERA").[14] Mr. Tardiff addressed the same claims of a price squeeze alleged by AT&T in Verizon's petition proceeding, stating that "[the] claim that the BOCS will cross-subsidize their interLATA services without [the OI&M] restrictions hinges on the (incorrect) proposition that the BOCs have any ability to impose above-cost access charges on other carriers."[15] Mr. Tardiff points out that this proposition is incorrect by first noting that access charges are a result of the CALLS settlement, of which AT&T was a participant, and constitute a

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[14] *See* Declaration of Timothy J. Tardiff, ¶¶ 21-24, attached to Reply Comments of Verizon, CC Docket No. 96-149 (filed Sept. 24, 2002) ("Tardiff Declaration").

[15] *Id.* ¶ 21.

very small portion of total cost of long distance service. Mr. Tardiff states that "access prices continue to be regulated and therefore cannot be increased by the ILECs. Accordingly, the proper focus is not cost allocation, but whether competition is capable of being harmed, given the regulated level of access charges. And the answer is clearly no[;] . . . imputation [safeguards placed on BOCs] provide[] all efficient firms sufficient ability to compete."[16] Mr. Tardiff goes on to demonstrate how the imputation requirement protects against any alleged price squeeze.

> When faced with the decision to offer long-distance at a particular price, a rational ILEC will ask itself whether it can earn more profits by offering the service itself than by selling access to competitors that would serve the volumes in question. The only circumstances under which a rational firm would sacrifice greater profits from offering access (i.e., engage in a price squeeze), would be if it believed it could drive its rivals out of the market and recoup the forgone profits with higher prices subsequent to that exit. Given the competitiveness of interLATA long-distance, such predatory behavior could not succeed.[17]

Clearly, all of the concerns voiced by AT&T, and other commenters, are obviated by price cap regulation. BOCs will not be able to participate in the parade of horribles that the commenters suggest will occur if the BOCs are permitted to provide OI&M services. The Commission should therefore remove the restrictions on OI&M and allow ILECs, as well as consumers, to reap the efficiencies that can, and will, take place by eliminating redundancies in the operations.

B. Discrimination Will Not Occur if OI&M Restrictions Are Eliminated

The second reason commenters discuss to oppose the removal of the OI&M restrictions is an alleged potential for the BOC to discriminate in favor of the 272 affiliate. They contend that a BOC's ability to provide its 272 affiliate OI&M functions will give the 272 affiliate

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[16] *Id.*

[17] *Id.* ¶ 22.

discriminatory access to the BOC's facilities. This argument, however, has to overlook the requirements of § 272(c) that prohibit the BOC from discriminating in favor of the 272 affiliate in the provision of any services, including OI&M functions if the BOC where allowed to provide them. To ensure that these requirements are met, the BOC must reduce the transactions to writing and make them available for public inspection. Accordingly, any entity may view the contract between the BOC and the 272 affiliate and obtain the same services contained within the contract under the same terms and conditions.

The price that the BOC will charge for providing OI&M functions will be set in the public contract. This will likewise be the price at which any entity may purchase OI&M services from the BOC. AT&T, along with its affiant, Lee Selwyn, contends that these provisions, which ensure that services provided to the 272 affiliate by the BOC, are meaningless in protecting non-affiliates from discrimination and misallocated costs. In Mr. Selwyn's Declaration, he asserts that "merely characterizing a service as being 'generally available' does not in any sense assure that, as a practical matter, nonaffiliated – and competing – firms would actually be able – or willing (for competitive reasons) – to buy the service from the BOC at the precise terms and conditions at which the inter-affiliate transfer takes place."[18] This position does not square up with the Commission's requirements. While BellSouth recognizes that a contract between the BOC and the 272 affiliate for non-tariffed services is not governed by the Commission's tariffing rules, when BellSouth provides a service to its 272 affiliate and posts the contract as public document, the contract, in effect, mirrors a tariff. Surely, Mr. Selwyn does not contend that a non-affiliate is not able, as a practical matter, to purchase tariffed these services from a BOC precisely as an affiliate can; however, that is what his statement suggests.

[18] Selwyn Declaration, ¶ 30.

Mr. Selwyn discusses some of the differences that do exist between a tariff and a public contract between a BOC and its 272 affiliate, but he misconstrues the application of the rules when discussing these differences. First, he states "BOCs and their affiliates are able to craft contracts that limit the ability of competitors to qualify for the service in question."[19] This is not true. The contracts entered into between BellSouth's BOC and its 272 affiliate are based on the 272 affiliate's needs. Volume and term commitments and any resulting discounts based on these commitments are normal contracting policy for most, if not all, companies. Any volume and term discounts that are offered to the 272 affiliate are completely available to any entity that commits to the same volumes and terms. Significantly, BellSouth is not aware of any request made by AT&T to purchase any of the services that BellSouth's BOC offers to its 272 affiliate. AT&T cannot now complain that it could not receive the same terms and conditions when it never even asked.

Second, Mr. Selwyn claims "a competing IXC purchasing OI&M services from the BOC would provide the BOC with the opportunity to degrade an IXC's interLATA services."[20] Non-affiliates, however, could protect themselves from this alleged degradation just as other carriers do in the contracting process through service level agreements and commitments. Indeed, BellSouth's 272 affiliate provides most of its services through resale contracts with large IXCs. It therefore obtains most OI&M services from these IXCs for the services that it purchases from them. Accordingly, it faces the same concern raised by Mr. Selwyn but has adequately protected

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[19] *Id.* ¶ 33.

[20] *Id.*

itself from service degradation through contractual commitments. There is no reason why IXCs purchasing services from the BOC could not do the same.[21]

Mr. Selwyn also takes issue with the price that would be charged for OI&M services. He states "if OI&M integration is permitted and the BOC ILECs are allowed to provide OI&M services to their § 272 affiliates, they will be able to misallocate costs by taking advantage of an important loophole in the Commission's rules"[22] related to the prevailing price methodology that is a part of the Commission's affiliate transaction rules. Mr. Selwyn goes on to say "[t]he use of the so called "prevailing company price" assumes (improperly in this case) that whatever internal transfer price is being charged by the . . . BOC for OI&M services represents the fair market value 'arm's length' price that is contemplated by Section 272(b)(5)."[23] This discussion revolves around the hierarchy of costs/price that a BOC must use to record an affiliate transaction with one of its affiliates. Section 32.27 of the Commission's rules require that transactions for non-tariffed services[24] that qualify for the prevailing price valuation to be recorded by the BOC at the prevailing price. To qualify for the prevailing price valuation, 25 percent of the total quantity of the BOC's sales for that particular service must be to third parties.[25] In the case of sales to the 272 affiliate, however, the Commission determined that because such services must be provided

[21] Mr. Selwyn states that if OI&M restrictions were removed, "the Commission would need to design, implement, monitor and meticulously enforce" performance metrics. *Id.* This is yet another attempt to increase regulation on the BOCs beyond what is necessary. If BOCs were allowed to provide OI&M functions to their 272 affiliates, prior to sunset, these services would be subject to the audit provisions of § 272 just as administrative services are today. The audit function, along with service level agreements, would be adequate monitoring of the nondiscriminatory provision of these services.

[22] Selwyn Declaration, ¶ 9.

[23] *Id.*

[24] Tariffed services must be recorded at the tariffed rate.

[25] 47 C.F.R. § 32.27(d).

to non-affiliates on a nondiscriminatory basis, the BOC might record those transactions "at the prevailing price regardless of whether the 25 percent threshold has been satisfied."[26] Mr. Selwyn has taken this rule to mean that the BOC can simply establish any price it chooses for sales to the 272 affiliate and use the prevailing price exception as a basis to record these sales at the established price. This interpretation, however, is incorrect. In order to comply with the arm's length requirement of § 272(b)(5) the BOC must have an independent basis for establishing that price. This can be a sale to third parties, even though third party sales need not be 25 percent of total sales. If the BOC has no sales to third parties, then it must obtain an independent good faith fair market valuation for the services.[27] Sales to third parties or an independent fair market valuation will approximate the standard that Mr. Selwyn claims is required for determining the price for OI&M services between a BOC and its 272 affiliate.[28] Mr. Selwyn's claim of a prevailing price "loophole" is wrong.

Some commenters indicate that the restrictions should remain in place because it places the BOCs and their 272 affiliates in the same position as nonaffiliated carriers.[29] They contend that non-affiliated carriers must provide their own OI&M services and cannot integrate them with local services like BOCs and their 272 affiliates will be able to do it the restrictions are lifted.

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[26] *Id.*

[27] Even if the BOC has no sales for OI&M services to third parties, an independent fair market valuation should be relatively easy to obtain as some 272 affiliates are purchasing these services from third parties today.

[28] *See* Selwyn Declaration, ¶ 9 (The transaction for OI&M services should be the amount a 272 affiliate "would be required to pay to non-affiliated providers for these services, or the costs that [it] would incur if the OI&M functions were undertaken internally on a stand-alone basis.")

[29] AT&T Comments at 4-5; Americatel Comments at 7.

This proposition is, of course, incorrect for the highly profitable (and therefore most competitive) enterprise market in which the IXCs have built end-to-end networks and can use integrated operations to service those networks. This argument also ignores the significant loss of local lines that BellSouth has experienced in all of its states since the inception of the Act. The arguments advanced by the commenters that the BOCs' facilities are required inputs for the BOCs' competitors is less and less true with the continued progression of local competition, in both the residential and the business markets, as well as with the growth of wireless and cable as substitutes for the BOCs' facilities. As the Commission found in approving BellSouth's § 271 applications, "[w]e also recognize BellSouth for the progress it has made in opening its local exchange markets to competition."[30] This line loss translates into competitive options for the IXCs for the last mile to the customer, options which translate into competitive markets and potential cost savings.

Moreover, what the IXCs studiously ignore is the fact that, in any given situation, the IXCs have a *choice* as to whether to build an end-to-end network and utilize its integrated operations or to utilize the BOCs' (or others') facilities. Thus, in every situation the IXC is in a better position than BellSouth because the IXC can balance the costs of building facilities versus the efficiencies of integration and make a rational economic choice, whereas BellSouth has no choice but to accept the inefficiencies inherent in separate operations.

It is not the amount of cost that could be saved that is relevant in this instance – rather, it is the fact that costs exist as a direct result of regulations that are redundant and unnecessary.

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[30] *In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina and South Carolina,* WC Docket No. 02-150, *Memorandum Opinion and Order,* 17 FCC Rcd 17595, 17597, ¶ 3 (2002).

For that type of regulation, any costs are too high and any inefficiencies are unnecessary. In short, any cost incurred from a redundant and unnecessary regulation is too much cost.

Finally, a significant point that has been completely overlooked in this entire debate is the fact that BOCs may currently provide virtual collocation for their 272 affiliates.[31] Under most virtual collocation arrangements, the BOC installs and maintains the collocator's equipment within the BOC's premises. In the provision of virtual collocation, the BOC effectively provides many OI&M services to the recipients of this collocation service. If a BOC can provide virtual collocation without the concerns voiced by the commenters, the provision of OI&M on facilities owned by the 272 affiliate should be no different.

III. The Commission Should Allow BOCs to Jointly Own Facilities with Their 272 Affiliates

Despite AT&T's claims, Congress did not require a prohibition of joint ownership of switching, transmission facilities, or the land and buildings on which they are located. As BellSouth discussed in its comments, Congress certainly knew how to include language to restrict such ownership,[32] but did not do so. Indeed, the legislative history reveals that the House Report included a restriction on such joint ownership; however, this language was removed from the final legislation. The removal indicates that Congress specifically chose not to prohibit joint ownership.

Additionally, the removal of the joint ownership restriction, along with the OI&M restrictions discussed above, will not render the "operate independently" section of the statute meaningless. Entities frequently own common assets but operate on an independent basis. The

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[31] *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, at Amended,* CC Docket No. 96-149, *Third Order on Reconsideration,* 14 FCC Rcd 16299, 16315, ¶ 20 (1999).

[32] *See* 47 U.S.C. § 274(b).

value of the amount owned by each company is determined and recorded on the respective company's books. Use of the assets is based on the amount owned. This does not mean that the companies are dependent upon each other for their operations. They continue to make separate business decisions, by separate employees and officers. They continue autonomous existences and their operations are not intertwined. Indeed, a BOC and its 272 affiliate could today jointly own an office building for their administrative workers. If they did, the BOC and the 272 affiliate would continue to operate independently and the Commission has found this to be completely within Congress' mandate. Allowing BOCs and their 272 affiliates to jointly own switching and transmission facilities, including the land and buildings where such assets are located, equally would not violate Congress' "operate independently" standard.

AT&T argues that the Commission cannot remove the joint ownership restrictions without creating inconsistencies with prior Commission decisions. AT&T cites the *Computer II* and *Competitive Carrier Orders,* stating "[p]ermitting joint ownership of switching and transmission facilities would disavow the premise of these orders."[33] This is simply not true. The Commission has often found that, as markets develop and change, regulation that was once thought needed is no longer necessary. A perfect example is the *Computer III* proceeding. There the Commission determined that a structurally separate affiliate was no longer necessary for a BOC to provide enhanced services. The Commission allowed the BOCs to offer such services on an integrated basis, which they continue to do today. Just as the Commission allowed the offering of services on an integrated basis for which it once required complete separation, it can remove the joint ownership restrictions it created in the *Non-Accounting Safeguards Order*.

[33] AT&T Comments at 16.

Finally, AT&T contends that removal of the joint ownership restrictions would create unfair advantages for the BOCs and their 272 affiliates. Most of these allegations are based on costs allocation. As discussed above, these are no longer valid concerns under price cap regulation. Regarding the other potential alleged disparities, BellSouth has also pointed out that IXCs currently have the ability to offer integrated services, and often do, to their lucrative large business customers – the customers in the most competitive market.

IV. Conclusion

For the foregoing reasons, the Commission should eliminate its rules prohibiting BOCs and their 272 affiliates from performing OI&M functions for each other and from jointly owning switching and transmission facilities, including the land and buildings where they are located.

Respectfully submitted,

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Dated: December 22, 2003

CERTIFICATE OF SERVICE

I do hereby certify that I have this 22nd day of December 2003 served the parties to this action with a copy of the foregoing **REPLY COMMENTS OF BELLSOUTH** by electronic filing, electronic mail and/or U.S. Mail to the parties on the attached service list.

/s/ Lynn Barclay
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